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IN THE

Supreme Court of the United States

October Term, 1988

MILTON FRIEDMAN,

Petitioner,

vs.

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated and ARTHUR YOUNG & CO., partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

Does Section 11(e) of the Securities Act of 1933, 15 U.S.C. §77k(e), which requires that costs (including attorneys fees) are to be awarded only if the suit or defense is "without merit", control over Rule 54(d), Fed.R.Civ.P., which allows costs "as of course" except "when express provision therefor is made ... in a statute of the United States"?

The District Court answered, correctly, "Yes", but the Court of Appeals reversed, and answered the question negatively.

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Opinions and Orders Below

The following are the official reports of the opinions relating to the judgment sought to be reviewed:

1. *Friedman v. Ganassi*, 674 F.Supp. 1164 (W.D. Pa. 1987); and

2. *Friedman v. Ganassi*, 853 F.2d 207 (3d Cir. 1988) (reversing the District Court).

A related judgment order which is not pertinent to this Petition is at *Friedman v. Ganassi*, 829 F.2d 31 (3d Cir. 1987).

Statement of Jurisdiction

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was entered on August 1, 1988. The order of the Court of Appeals denying a petition for rehearing was entered on August 26, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statute and Rule Involved

This case involves 15 U.S.C. §77k(e) and Rule 54(d) of the Federal Rules of Civil Procedure. The text of these provisions is set forth below:

15 U.S.C. §77k(e)

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public

were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Fed. R. Civ. P. 54(d)

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Statement of the Case

Plaintiff Milton Friedman brought this class action under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k. He sought to recover losses sustained by a class of purchasers of $7 million of publicly-offered debentures of Funding Systems Corporation ["FSC"]. The named Defendants were four individual FSC officers, the accounting firm of Arthur Young & Co., and two underwriters for the debentures, Laidlaw Adams & Peck, Inc. and The Ohio Company, as representatives of the class of all involved underwriters. Prior to trial, Plaintiff reached a classwide settlement with the individual Defendants, who are no longer parties.

At trial, a jury rendered a verdict for the remaining Defendants, and the Court of Appeals affirmed. *Friedman v. Ganassi,* 829 F.2d 31 (3d Cir. 1987).

The Defendants thereafter sought to recover costs in excess of $138,000. After the decision by this Court in *Crawford Fitting Co. v. J. T. Gibbons, Inc.,* 107 S.Ct. 2494 (1987), the Defendants conceded that they were precluded from recovering approximately $100,000 of experts' fees, which Defendants had claimed were recoverable costs.

The District Court denied the remaining costs, totalling approximately $37,500. 674 F. Supp. 1165 (W.D. Pa. 1987). The District Court held that 15 U.S.C. §77k(e) controlled the award of costs since the case had been brought solely under the Section 11 of the Securities Act of 1933. The District Court held that Plaintiff's claims were not "without merit" (See 15 U.S.C. §77k(e)). The District Court concluded that awarding costs "as of course" (Rule 54(d)) would render a major portion of Section 11(e) "superfluous" since the

"as of course" standard always would result in a cost award before the "without merit" standard of Section 11(e) is even reached.

The Defendants appealed. They did not challenge the District Court's finding of merit in Plaintiff's claims. 853 F.2d 207, 208 n. 2. The Court of Appeals reversed and directed the District Court, on remand, to award costs "as of course" unless such an award would be "inequitable". *Id.* at 211. The mandate has been stayed pending this Petition.

The Court of Appeals in rejecting the clear and plain language of Rule 54(d), which expressly subordinates the Rule to other cost provisions, ignored the Advisory Committee's 1937 Note to the Rule which listed 15 U.S.C. §77k(e) as one of the statutes "unaffected" by the Rule. The Court of Appeals' decision also creates a conflict in the Circuits by rejecting the holding in *Can-Am Petroleum Co. v. Beck,* 331 F.2d 371, 374 (10th Cir. 1964) (costs and fees may be awarded in Section 11 cases only if the losing party's position is "without merit").

ARGUMENT

A. Introduction

This lawsuit presents solely a question of statutory construction involving the interplay between 15 U.S.C. §77k(e) and Fed. R. Civ. P. 54(d).

The enormous judicial power to declare the meaning of statutes and rules can be exercised properly only when the judiciary acts predictably. Thus, this Court (and others) have developed principles of statutory construction which have one goal in mind: to effectuate the intention of the legislature.

In the present case, the Court of Appeals ignored the fundamental principle of statutory construction that no words of a statute should be rendered meaningless if a sensible alternative construction giving all words meaning is available. See, for example, *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987) ("We can not accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning." *Id.* at 2497). The Court of Appeals also ignored the principle that repeals of statutes by implication are strongly disfavored and may not be found unless the conflicting provisions are "irreconcilable." *Rodriguez v. United States*, 107 S.Ct. 1391 (1987). The Court of Appeals also failed to give any weight to the Notes of the Advisory Committee, which if followed, would have required affirmance of the District Court's judgment denying costs.

The amount of money involved here (about $37,500) is very substantial for an individual investor, although not enormous in absolute terms. Nevertheless, the judgment below is important because of its chilling effect on the bringing of meritorious securities fraud actions, because

of the conflict in the Circuits (see *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371 (10th Cir. 1964)) and because a portion of Section 11(e) of the Securities Act has been rendered meaningless.

B. Section 11(e) of the Securities Act of 1933 Contains an Express Provision for Costs to Which Rule 54(d) Is, by Its Own Terms, Subordinate

By the express terms of the Securities Act of 1933, costs may be recovered only if the losing party's position is "without merit", *i.e.*, frivolous, and only upon motion to the court.[1] In pertinent part, 15 U.S.C. §77k(e) provides:

> In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been *without merit*. . . . (Emphasis supplied.)

On the other hand, Rule 54(d) permits a cost award to the prevailing party, taxed by the clerk "as of course," unless the court "otherwise directs" in exceptional circumstances.[2] In pertinent part, Fed. R. Civ. P. 54(d) provides:

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[1] Courts consistently have defined the "without merit" standard in 15 U.S.C. §77k(e) to mean "frivolous." See, *e.g.*, *Can-Am Petroleum Co. v. Beck*, *supra*, 331 F.2d at 374; *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1056 (2d Cir. 1969); and *Rucker v. La-CO, Inc.*, 496 F.2d 850, 853 (8th Cir. 1974).

[2] If Rule 54(d) applies in a case, the discretion of the Court to "otherwise direct [ ]" that costs *not* be awarded is limited. See, *e.g.*, *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976) (Court must find and articulate a reason why party does not deserve a cost award) and *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 662, 664-65 (3d Cir. 1975).

> Except when express provision therefor is made . . . in a statute of the United States, costs shall be allowed *as of course* to the prevailing party unless the court otherwise directs. . . . (Emphasis supplied.)

Since the Defendants have not challenged the District Court finding that Plaintiff's claims were not frivolous, 853 F.2d at 208, n. 2, the issue for resolution on the merits is whether 15 U.S.C. §77k(e) is a statute making "express provision" for costs.

On its face, Section 11(e) clearly contains an express provision for costs. Nevertheless, the Court of Appeals held that since the cost provision of Section 11(e) was "not confined" to traditional costs, but included attorneys' fees as well, Section 11(e) was not such an "express provision" for costs as referred to in Rule 54(d). The Court stated:

> Section 11(e) is not such an "express provision" because it does not provide an alternative standard for awarding taxable costs. As is clear from its face, §11(e) provides a standard to be applied by district courts in determining whether to make an award that is *not confined* to taxable costs, namely an award of the costs of [a §11] suit . . . in an amount sufficient to reimburse [the prevailing party] for the reasonable expenses incurred by him, in connection with such suit," specifically "*including* reasonable attorney's fees." [Emphasis added.]

It similarly could be reasoned that Section 11(e) does not pertain to attorneys' fees because it is not confined to attorneys' fees. Such "reasoning" is obviously fallacious. In fact, as will be demonstrated, this

interpretation also contradicts the Advisory Committee Notes to Rule 54(d) and renders a portion of Section 11(e) without meaning.[3]

The Court of Appeals in the present case has frustrated Congressional intent by altering the balancing of interests contemplated by Congress.

C. The Interpretation of the Court of Appeals Is Contrary to the Advisory Committee Note to Rule 54(d)

The judgment of the Court of Appeals is contrary to the Advisory Committee's Note to Rule 54(d) of the Federal Rules of Civil Procedure. As a result, the judgment conflicts with numerous decisions of this Court which give substantial weight to the Notes of the Advisory Committee on Rules.[4]

In pertinent part, Note 3 of the Advisory Committee to Rule 54(d) states that Section 11(e) is "unaffected" by the Rule:

* * *

> The provisions of the following and similar statutes as to costs are unaffected:

* * *

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[3] The somewhat unique language of Section 11(e) was the result of Congressional compromise. Although some proponents of the statute sought to deter "blackmail suits," others were concerned with "purely contentious litigation on the part of the defendant," as indicated in the Conference Report, 73d Cong., 2d Sess., Report No. 1838, pp. 41-42, *reprinted* in *Federal Securities Laws: Legislative History* 1933-1982 (1983), pp. 1209-10. Thus, that Report concludes: "The suggested amendments seem equitable."

[4] The Advisory Committee worked extensively on the initial promulgation of the Federal Rules of Civil Procedure. The provisions of Rule 54(d) have been unchanged since issued more than fifty years ago.

> U.S.C., Title 15, §77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933). 28 U.S.C. App., p. 621 (1982).

Clearly, the drafters of the Rules were aware of and took into account the fact that various statutes had explicit provisions regarding costs. For that reason, Rule 54(d) begins: "Except when express provision therefor is made . . . in a statute of the United States. . . ." Equally clearly, the Rules were *not* intended to affect the cost provisions of those statutes. An interpretation that costs are to be awarded "as of course" in Section 11 cases certainly "affects" Section 11(e), as it makes its "without merit" standard superfluous with respect to costs other than attorneys' fees, to which costs Section 11(e) clearly applies.

Despite the fact that Plaintiff Friedman directed the Court of Appeals' attention to the Advisory Committee Note, its opinion glaringly omits any discussion of that Note. This failure by the Court of Appeals to give any weight to the Advisory Committee Note led to the erroneous holding.

This Court has frequently utilized the Notes of the Advisory Committee on Rules to aid it in construing various of the Federal Rules of Civil Procedure.[5] Courts are to give weight to the construction by the Advisory Committee. *Mississippi Publishing Corp. v. Murphree, supra*, 326 U.S. at 444. The Advisory Committee Notes also demonstrate that the drafters of the Rules were aware of statutes like 15 U.S.C. §77(e) with provisions

[5] See, *e.g.*, *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (Rule 4); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (Rule 23); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 356-61 (1981) (Rule 68); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (Rule 15); and *Marek v. Chesny*, 473 U.S. 1, 5 (1985) (Rule 68).

which included attorney's fees as part of awardable costs, as this Court has recognized. *Marek v. Chesny, supra*, 473 U.S. at 8.

In this case, the Court of Appeals gave *no* weight whatsoever to the Advisory Committee's construction. No reason for rejecting the Advisory Committee's view has been articulated and none exists. This Petition should be granted to ensure that the Notes of the Advisory Committee be considered fully by the lower courts.

D. The Construction of Rule 54(d) by the Court of Appeals Renders a Portion of the Securities Act of 1933 Meaningless

The Court of Appeals construed Rule 54(d) as controlling over Section 11(e). In so ruling, the Court of Appeals rendered the cost portion of Section 11(e) meaningless. Clearly, the more lenient "as of course" standard under Rule 54(d) would always provide for the award of costs before the "without merit" (or "frivolous") standard of Section 11(e) is even considered.

In denying costs to the Defendant underwriters and accountant, United States District Judge Mencer correctly concluded that, by its own terms, the "as of course" standard is subservient to express statutory cost provisions to the contrary, including 15 U.S.C. §77k(e). The District Court reasoned succinctly:

> Any other result would render most of Section 11(e) totally ineffective. Section 11(e) applies to the "costs of such suit, including reasonable attorney's fees." Under an interpretation that Rule 54 and Section 11 are alternatives, Section 11 would always yield to the more lenient standards of Rule 54 with respect to costs. Thus, the main portion of Section 11(e) would be entirely superfluous. 674 F.Supp. at 1167.

The Court of Appeals violated numerous well-established principles of statutory construction:

(1) The Court of Appeals rendered a portion of Section 11(e) "entirely without meaning," contrary to *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 107 S.Ct. 2494, 2497 (1987).

(2) The Court of Appeals rendered a major portion of Section 11(e) superfluous, contrary to the principle articulated in *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961), that where a statute admits a reasonable construction which gives effect to all of its provisions, courts are not to adopt "a strained reading which renders one part a mere redundancy."

(3) The Court of Appeals found that a specific statute, Section 11(e), was controlled by a general provision, Rule 54(d), contrary to the rule articulated in *Crawford Fitting Co., supra*, 107 S.Ct. at 2499, that " '[w]here there is no *claimed* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' "

(4) The Court of Appeals did not read Rule 54(d) and Section 11(e) "in pari materia," contrary to *Crawford Fitting Co., supra*, 107 S.Ct. at 2499.

(5) By rewriting Section 11(e) so that it does not apply to "taxable costs," the Court of Appeals ruled contrary to the principle articulated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 270 (1975) that ". . . it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

(6) By declaring that Section 11(e) does not apply to "taxable costs" despite any legislative history so indicating, the Court of Appeals ruled contrary to the principle articulated in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n. 13 (1985) that "... congressional silence ... cannot override the words of the statute."

(7) The Court of Appeals ruled contrary to the fundamental principle articulated by Justice Frankfurter in *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) that in construing a statute, the courts must "ascertain" and not "add," "subtract," "delete" or "distort" the words Congress uses.

(8) The Court of Appeals has repealed a portion of Section 11(e) "by implication," despite the lack of any "irreconcilable conflict" making such interpretation necessary, contrary to *Rodriguez v. United States*, 107 S.Ct. 189 (1987). And

(9) The Court of Appeals has, as demonstrated above, given no weight to, and failed to consider, the Advisory Committee Notes which are entitled to substantial weight under *Mississippi Publishing Corp. v. Murphree, supra*, and other cases.

In sum, by ignoring basic tenets of statutory construction, the Court of Appeals reached an erroneous decision, distorting Rule 54(b) and nullifying a significant provision of the securities laws.

The violation of these tenets of statutory construction in connection with an important statute and procedural rule also warrants granting this Petition.

E. The Decision Below Creates a Conflict Between the Tenth and Third Circuits

The Court of Appeals' holding directly conflicts with an explicit holding of the United States Court of Appeals for the Tenth Circuit. Furthermore, the Court of Appeals' reasoning conflicts with the result and principles expressed by other courts confronted with identical or analogous issues.

In this case, the Court of Appeals defined the issue at the beginning of its opinion, as follows:

> This appeal presents the narrow question whether in suits brought under §11 of the Securities Act of 1933, 15 U.S.C. §77k, the taxable costs specified in 28 U.S.C. §1920 are to be "allowed as of course to the prevailing party" under Fed.R.Civ.P. 54(d) or whether they can be awarded only upon a fiduciary under §11(e) of the Securities Act that the losing party's position was wholly without merit. *Friedman v. Ganassi*, 853 F.2d 207 (3d Cir. 1988).

Although denied by the Court of Appeals,[6] its holding is clearly contrary to the Tenth Circuit and is at odds with numerous other court decisions.

The Third Circuit's holding here clearly conflicts with *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371 (10th Cir. 1964), a case which, like this case, was prosecuted solely under the Securities Act of 1933. The District Court awarded costs, including attorney's fees, to the prevailing plaintiffs. On appeal, the Tenth Circuit affirmed the liability judgment, but *not* the award of costs. The Tenth Circuit held:

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[6] The Court of Appeals stated: "... [W]hile the narrow issue presented by this case and resolved by this holding has not yet been explicitly addressed in a reported case, there are numerous cases that have 'reach[ed] results which imply the adoption of one position or another.' " *Id.*, at 209 (Citations omitted).

> In awarding plaintiffs judgment for costs and attorneys' fees the trial court determined the itemized costs to be $3,721.08 and the sum of $6,000.00 to be reasonable attorneys' fees for all plaintiffs combined. *Such an award is sustainable only if "the court believes the suit or the defense to have been without merit ***." 15 U.S.C. §77k(e).* The court below made no finding that the defense was without merit. Since an unsuccessful defense is not necessarily without merit and, indeed, the term implies a defense bordering on frivolity, we must remand this aspect of the case for further consideration and a specific finding . . . .
>
> The case is remanded for further consideration in regard to costs and attorneys' fees . . . . *Id.*, 331 F.2d at 374 (Emphasis supplied; citations omitted).

Thus, the Tenth Circuit's holding was that costs were awardable only if the losing party's position was "without merit." This directly conflicts with the Third Circuit's holding here that costs *are* awardable even though the losing party's position is *not* "without merit."

A more recent district court case also is contrary to the Third Circuit's judgment here. In *McLish v. Harris Farms, Inc.*, 507 F.Supp. 1075 (E.D. Cal. 1980), the District Court held that the "as of course" rule was inapplicable to cost claims under the Securities Act of 1933. The District Court stated:

> *Unlike other actions, costs including attorneys fees are not allowable as a matter of course* to the prevailing parties in Securities cases. In order to recover such additional emoluments, the prevailing party in securities cases must prove that either the suit itself or the defense thereto was without merit, bordering on triviality, and the court must so find in awarding attorneys fees and costs. *Id.*, 507 F. Supp. at 1088 (Emphasis supplied).

All other decisions known to counsel in cases under the Securities Act of 1933 are consistent with *Can-Am Petroleum Co. v. Beck, supra,* and *McLish v. Harris Farms, Inc., supra.* Other courts either made no cost award if the losing party's position was not "without merit"[7] or awarded costs where the losing party's position was wholly "without merit."[8] Neither the defendants nor the Court of Appeals cited any case awarding costs under the Rule 54(d) "as of course" standard in a case brought solely under the Securities Act of 1933. Petitioner Friedman knows of no such case either.[9] Accordingly, this Court should grant this Petition because the Third Circuit's decision conflicts directly with the Tenth Circuit's decision and with all other reported decisions under the Securities Act of 1933.[10]

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[7] See, *e.g., Katz v. Amos Treat & Co.,* 411 F.2d 1046, 1056 (2d Cir. 1969) and *Homburger v. Venture Materials, Inc.,* [1985-86 Transfer Binder] CCH Fed.Sec.L.Rep. ¶92,205 (S.D. N.Y. 1985).

[8] See, *e.g., Rubin v. Long Island Lighting Co.,* 576 F.Supp. 608, 614-16 (E.D. N.Y. 1984).

[9] There are decisions with costs awarded in multiple claim cases where *some,* but not all, of the claims arise under the Securities Act of 1933. See, *e.g., Aid Auto Stores, Inc. v. Cannon,* 525 F.2d 468 (2d Cir. 1975) and *Electro-Nucleonics, Inc. v. Oppenheimer,* [1975-76 Transfer Binders] CCH Fed.Sec.L.Rep. ¶95,269 (S.D. N.Y. 1975). Under these circumstances, costs are awardable under Fed.R.Civ.P. 54(d) regarding the non-1933 Act claims.

[10] Like Section 11(e), several statutes have been held to overrule the "as of course" language in Rule 54(d). See, *e.g., Sanford v. CBS, Inc.,* 108 F.R.D. 42, 43 (N.D. Ill. 1982) (In copyright action, 17 U.S.C. §505 overrides Rule 54(d) ("the usual procedure for taxing costs under Rule 54(d) was not intended to apply in any suit where there is a specific costs provision built into the controlling statute."); *Zaruba v. Tobin,* 23 F.R.D. 213, 215 (D. Alas. 1959) (statute limiting *all* costs in libel cases where damages awarded are less than $50); and *Lewis v. Pennington,* 400 F.2d 806, 819 (6th Cir.), *cert. denied,* 393 U.S. 983 (1968) (Clayton Act makes award of *all* costs mandatory to prevailing plaintiff).

Conclusion

Petitioner Milton Friedman respectfully requests that this Court grant the Writ of Certiorari because (1) there is a conflict among the Courts of Appeals as to the issue in this case, (2) an important provision of the Securities Act of 1933 has been rendered meaningless, and (3) important and recurring principles of statutory construction are at issue.

Respectfully submitted,

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APPENDIX A

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (12/9/87)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MILTON FRIEDMAN,

Plaintiff,

v.

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW, ADAMS & PECK INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated, and ARTHUR YOUNG & CO. partnership.

Civil Action No. 83-1946

MEMORANDUM OPINION

Milton Friedman, the plaintiff, brought a class action under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k. Friedman was unsuccessful at trial, and Arthur Young & Company, Laidlaw Adams & Peck, and The Ohio Company submitted bills of cost. This court is presently considering whether to award costs to these defendants.

1. *Legal Analysis*

The threshold issue in this case is whether to apply the standard for awarding costs found in Rule 54(d) of the Federal Rules of Civil Procedure (Rule 54) or the standard in Section 11 of the Securities Act of 1933 (Section 11). The standards are significantly different, and the awarding of costs in this case depends entirely upon which standard we apply.

Under Rule 54, costs are awarded almost automatically. The rule states that "except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." F.R.Civ.P. 54(d). Under this standard, the defendants are entitled to some costs, even though they might not be entitled to the full amount they claimed.

Under Section 11, costs are awarded only when the action is frivolous. Section 11 states "In any suit under this or any other section of this subchapter the court may, in its discretion, require . . . the payment of the costs of such suit, including reasonable attorney's fees [by the losing party] if the court believes the suit or the defense to have been without merit. . . ." 15 U.S.C.A. §77k(e). After observing a lengthy trial, we find that, although Friedman's suit was not strong, it was not entirely without merit. Under this standard, therefore, the defendants are not entitled to costs.

Thus, the selection of cost provisions is outcome determinative. The defendants argue that their motion is under Rule 54, so that standard should apply. They argue that the provisions are not mutually exclusive, so they may make their motion under either cost provision.

Friedman argues that Section 11 is the only provision that applies to this case. Friedman brought the entire suit under the provisions of Section 11, so that Section 11's cost provision must apply. Rule 54 does not apply, Friedman argues, because by its own language, Rule 54 applies only in the absence of a cost provision in an applicable United States Statute.

One would expect that this narrow issue of whether the court may apply the cost provisions in Rule 54 to a case brought under 15 U.S.C.A. §77k would have been addressed in a reported case, but apparently it has not. The cases reach results which imply the adoption of one position or another with respect to this issue, but they do not overtly recognize the issue and resolve it. Nonetheless, we will examine some of these cases to glean any insight as to the preferable approach.

Case Law

If the trial judge concludes that a Section 11 suit was brought without merit or was frivolous, then he generally awards costs and/or attorney's fees under Section 11. *See, e.g., Gmelin v. Permeator Corp.*, 1984-85 Fed. Sec. L. Rep. (CCH) ¶91,946 (D.N.J. 1985); *Rubin v. Long Island Lighting Co.*, 576 F. Supp. 608 (E.D.N.Y. 1984). Cases in which the trial judge concludes that the suit had some merit, however, are split as to whether the judge awards costs.

The primary case cited by the defendants to support the proposition that Rule 54 applies in Section 11 cases is *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980). *Nemeroff* does not apply to the instant litigation, however, because *Nemeroff* involved Rule 11 of the Federal Rule of Civil Procedure, not Section 11 of the Securities Act of 1933.

At least one judge did apply Rule 54 to award costs even though the movant did not meet the standards in Section 11. In *Electro-Neucleonics, Inc. v. Oppenheimer,* 1975-76 Fed. Sec. L. Rep. (CCH) ¶95,269 (S.D.N.Y. 1975), the New York court considered a suit involving causes of action under both Section 11 and Section 10(b) of the 1934 Exchange Act. The defendants won, and petitioned the court for costs and attorney's fees. The court concluded that Section 11 required a finding that the suit was without merit, a finding which the court was unwilling to make. The court proceeded to award costs under Rule 54. The wording of the New York court suggests that it considered Section 11 and Rule 54 as alternatives, despite Friedman's argument that the presence of the count under Section 10(b) vitiates this conclusion.

The cases cited by the plaintiff to support the proposition that Rule 54 does not apply in Section 11 cases are no more conclusive than the cases cited by the defendants. These cases generally deny attorney's fees or costs under Section 11 and do not discuss Rule 54 at all. Thus, the plaintiff must argue that the cases speak by their silence, that if Rule 54 possibly applied, these courts would surely have addressed it. Although the absence of Rule 54 in the Section 11 cases is conspicuous, we generally hesitate to reason that a legal theory is invalid merely because it does not appear in a particular case.

Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969) is an example of the phenomenon cited by the plaintiff. In *Katz,* the district judge denied the defendant's motion for expenses because, although he had a "dim view" of the plaintiff's case, he was unwilling to conclude that it bordered on frivolity. The circuit court affirmed the

district court. Under Rule 54, costs are awarded as a matter of course. If Rule 54 applied to the Section 11 action in *Katz,* plaintiff argues, the court would have awarded costs. The fact that Rule 54 is absent from the opinion implies, at the minimum, that Rule 54 does not apply to the Section 11 action in *Katz.*

Homburger v. Venture Minerals, Inc., 1985-86 Fed. Sec. L. Rep. (CCH) ¶92,205 (S.D.N.Y. 1986), contains a similar denial of expenses under Section 11 and an absence of consideration of Rule 54. The judge felt that he could not conclude that the suit was wholly frivolous, so he denied the motion under the standards of Section 11. The plaintiff argues that the judge would have awarded costs in *Homburger* if Rule 54 applied to Section 11 cases. *See also Klein v. Shields & Co.,* 470 F.2d 1344 (2d Cir. 1972) (reversing and remanding an award of attorney's fees under Section 11 because the judge failed to make a specific finding that the suit was without merit or was frivolous as required by Section 11).

2. *Conclusion*

The narrow issue before this court, as we previously stated, is whether the court may apply the cost provisions in Rule 54 to a case brought under 15 U.S.C.A. §77k. We consider this issue in the absence of any conclusive case law, relying primarily on the wording of Rule 54 and the existence of Section 11(e). Rule 54 expressly limits itself to those cases in which no federal statute applies. The cost provisions of Section 11 plainly apply to the instant case, so we will not apply the provisions of Rule 54. Any other result would render most of Section 11(e) totally ineffective. Section 11(e) applies to the "costs of such suit, including reasonable

attorney's fees." Under an interpretation that Rule 54 and Section 11 are alternatives, Section 11 would always yield to the more lenient standards of Rule 54 with respect to costs. Thus, the main portion of Section 11(e) would be entirely superfluous. Consequently, we now hold that the court should not apply Rule 54(d) of the Federal Rules of Civil Procedure to award costs when the movant does not meet the standards of Section 11(e) of the Securities Act of 1933.

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MILTON FRIEDMAN,

Plaintiff,

v.

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW, ADAMS & PECK INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively of behalf of a class of defendants similarly situated, and ARTHUR YOUNG & CO. partnership.

Civil Action No. 83-1946

AND NOW, this 9th day of December, 1987, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) The bill of costs submitted by Arthur Young & Company is DENIED; and

(2) The bill of costs submitted by Laidlaw Adams & Peck and The Ohio Company is DENIED.

GLENN E. MEMER
United States District Judge

cm: All parties of record. (RVB)

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit (8/1/88)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3014 and 88-3015

MILTON FRIEDMAN

vs.

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated, and ARTHUR YOUNG & CO., partnership

Laidlaw Adams & Peck, Inc. and The Ohio Company,
Appellants in No. 88-3014
Arthur Young & Company,
Appellants in No. 88-3015

On Appeal From the United States District Court For the Western District of Pennsylvania (Pittsburgh) (Civil Action No. 83-1946)

Argued June 7, 1988

BEFORE: STAPLETON, GREENBERG, and HUNTER, *Circuit Judges*

(Opinion Filed August 1, 1988)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*.

This appeal presents the narrow question whether in suits brought under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k(e), the taxable costs specified in 28 U.S.C. § 1920 are to be "allowed as of course to the prevailing party" under Fed.R.Civ.P. 54(d) or whether they can be awarded only upon a finding under § 11(e)

of the Securities Act that the losing party's position was wholly without merit. Because we disagree with the district court's conclusion that Congress intended the § 11(e) standard to control the recovery of taxable costs by a prevailing party in litigation under § 11, we will reverse the order denying the defendants' motions for costs and remand for further proceedings in the district court.

I.

Plaintiff Milton Friedman brought suit on claims arising under § 11 of the Securities Act on behalf of a class of purchasers of certain publicly-offered corporate debentures. The defendants included a number of underwriters, represented here by Laidlaw Adams & Peck and The Ohio Company, and the accounting firm of Arthur Young & Company. The jury rendered a verdict for the defendants, which Friedman unsuccessfully challenged on appeal to this court. *See Friedman v. Ganassi*, 829 F.2d 31 (3d Cir. 1987) (affirming by judgment order). Having prevailed, the defendants moved for an award of taxable costs pursuant to Rule 54(d).[1] The motions were denied. The district court held that § 11(e) controls the awarding of taxable costs in § 11 actions and allows a court to

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1. At that time, the costs sought by the defendants included substantial amounts of expert witness fees. The Supreme Court has since ruled in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494, 2499 (1987), that "absent explicit statutory or congressional authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920," which limitations are presently $30 per day. In light of *Crawford Fitting*, the defendants here have withdrawn that part of their request for costs that was attributable to expert witness fees in excess of the statutory limits. The remaining amounts of costs sought are approximately $11,500 by the underwriters and approximately $26,000 by Arthur Young.

award such costs to a defendant only if the plaintiff's suit is wholly without merit. Since the court viewed the plaintiffs' § 11 claims as "not entirely without merit," 674 F. Supp. 1165, 1166,[2] it concluded that it was without discretion to make the requested award.

Defendants appeal from the order denying costs. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and our review of this issue of law is plenary. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

II.

Section 11(e) provides in pertinent part:

> In any suit under this or any other section of this subchapter, the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

15 U.S.C. § 77k(e).

Fed.R.Civ.P. 54(d) provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these

---

2. The district court's finding on this point is not challenged by the defendants.

> rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .

Interpreting the above provisions, the district court took the following view:

> Rule 54 expressly limits itself to those cases in which no federal statute applies. The cost provisions of Section 11 plainly apply to the instant case, so we will not apply the provisions of Rule 54. Any other result would render most of Section 11(e) totally ineffective. Section 11(e) applies to the "costs of such suit, including reasonable attorney's fees." Under an interpretation that Rule 54 and Section 11 are alternatives, Section 11 would always yield to the more lenient standards of Rule 54 with respect to costs. Thus, the main portion of Section 11(e) would be entirely superfluous. Consequently, we now hold that the court should not apply Rule 54(d) of the Federal Rules of Civil Procedure to award costs when the movant does not meet the standards of Section 11(e) of the Securities Act of 1933.

674 F. Supp. at 1167. As the district court found, while the narrow issue presented by this case and resolved by this holding has not yet been explicitly addressed in a reported case, there are numerous cases that have "reach[ed] results which imply the adoption of one position or another." *See, e.g., Aid Auto Stores, Inc. v. Cannon*, 525 F.2d 468, 471 (2d Cir. 1975) (affirming judgment of dismissal and award of costs, but reversing award of attorney's fees since suit was not entirely without merit); *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1056 (2d Cir. 1969) (affirming district court's denial of costs under § 11(e) as a reasonable exercise of discretion); *Can-Am Petroleum v. Beck*, 331

F.2d 371, 374 (10th Cir. 1964) (affirming judgment for plaintiffs but remanding for further consideration of the award under § 11(e) of costs and attorney's fees); *Homburger v. Venture Minerals, Inc.*, 1985-86 Fed. Sec. L. Rep. (CCH) ¶ 92,205 (S.D.N.Y. 1985) (denying prevailing party's motion for costs on the ground that the suit was not meritless); *Driscoll v. Oppenheimer & Co.*, 500 F. Supp. 174, 175 (N.D.Ill. 1980) (referring to § 11(e) as applicable only to shifting of attorney's fees); *McLish v. Harris Farms, Inc.*, 507 F. Supp. 1075, 1088 (E.D.Cal. 1980) (holding neither attorney's fees nor costs recoverable because the prevailing defendant had not shown that plaintiff's suit was so meritless as to border on frivolity); *Electro-Nucleonics, Inc. v. Oppenheimer*, 1975-76 Fed. Sec. L. Rep. (CCH) ¶ 95,269 (S.D.N.Y. 1975) (denying attorney's fees as standards of § 11(e) had not been met by movant, but allowing costs under Rule 54(d)). As these cases neither provide an analysis of the issue nor point to any single conclusion, we do not discuss or rely on them here, but like the district court, look to the wording of the provisions at issue and their respective purposes. In our view, the district court's reconciliation of § 11(e) and Rule 54(d) is not dictated by the text of those provisions and ignores the objectives that each is intended to accomplish.

Rule 54(d) provides a standard to be applied by the district courts in awarding what are commonly referred to as taxable costs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987). Those taxable costs are listed in 28 U.S.C. § 1920.[3] They do

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3. Under 28 U.S.C. § 1920:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

not include such litigation expenses as attorney's fees and expert witness fees in excess of the standard daily witness fee. *See Crawford Fitting*, 107 S. Ct. at 2499. Rule 54(d) requires that such taxable costs be awarded to the prevailing party unless the court finds and articulates a reason why that party does not deserve such an award. *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976); *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 662, 664-65 (3d Cir. 1975). As we demonstrate hereafter, this "as of course" standard has never been applied in our jurisprudence to anything other than the narrow category of taxable costs.

The Rule 54(d) standard for allocating taxable costs is expressly subordinated to any statute or other Federal Rule of Civil Procedure that makes "provision" for a different standard for allocating the "costs" to which the Rule pertains, i.e. the taxable costs enumerated in 28 U.S.C. § 1920. Section 1928 of Title 28, for example, provides that when a judgment is rendered for the plaintiff in a patent infringement

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(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

action and the patentee, in his specifications, claimed to be, but was not, the original inventor, no costs can be included in such judgment unless a proper disclaimer was filed before suit was commenced. By virtue of the initial clause of Rule 54(d), § 1928, rather than the Rule, governs in the described circumstances.[4]

The district court read the initial clause of Rule 54(d) as having broader application than the Rule itself. Because of this reading, it erroneously concluded that § 11(e) was the kind of "express provision" referred to in that clause. Section 11(e) is not such an "express provision" because it does not provide an alternative standard for awarding taxable costs. As is clear from its face, § 11(e) provides a standard to be applied by district courts in determining whether to make an award that is not confined to taxable costs, namely an award of the "costs of [a § 11] suit . . . in an amount sufficient to reimburse [the prevailing party] for the reasonable expenses incurred by him, in connection with such suit," specifically "including reasonable attorney's fees."

Some additional context is helpful at this point. English courts have traditionally made awards to the prevailing party for two types of litigation expenses. The first, "costs between party and party," are litigation expenses incurred by order of the court to facilitate consideration of the case. The second, "costs as between solicitor and client," are expenses incurred merely to aid one party in the presentation of his side of the controversy. The latter include attorney's fees and "other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute."

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4. Additional examples include 28 U.S.C. § 1925 (costs in admiralty cases); Fed.R.Civ.P. 68 (offer of judgment); Fed.R.Civ.P. 71A (condemnation cases).

Sprague v. Ticonic National Bank, 307 U.S. 161, 164 (1939).

In 1853, Congress "undertook to standardize the costs allowable in federal litigation" in this country. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 251 (1974). The "substance [of the 1853 Act], without any apparent intent to change the controlling rules, was . . . included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a)." *Id.* at 255 (footnote omitted). Section 1920 of the 1948 Code altered the existing law only by giving the court discretion *not to award* the specified items. Before 1948, an award of taxable costs to the prevailing party was mandatory. *See* Reviser's Notes following 28 U.S.C. § 1920 (1948). Section 1920 remains the same today. At no time in the history of the 1853 Act has it authorized or mandated the payment of attorney's fees to the prevailing party, other than the *de minimis* amounts permitted by 28 U.S.C. § 1923(a).

In 1882, Justice Bradley said the following of the 1853 Act:

> The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require.

Trustees v. Greenough, 105 U.S. 527, 535 (1882). More recently, in *Alyeska Pipeline*, the Supreme Court quoted Justice Bradley's remarks with approval, noting however that a district court's authority to make an award of litigation expenses other than the taxable costs itemized in § 1920 is limited to three

carefully cabined classifications of cases, including the "fund cases" referred to by Justice Bradley,[5] and cases in those particular categories for which Congress has specifically authorized such awards. 421 U.S. at 257-59 & n.30. In accordance with a line of cases going back to 1869, the *Alyeska Pipeline* Court held that district courts since the Act of 1853 had had no general authority to award attorney's fees.

When Congress created § 11 actions in 1933, that section included no provisions for an award to the prevailing party of any kind of litigation expense. Presumably, Congress therefore intended that, pursuant to the then existing law, the prevailing party in a § 11 suit would receive taxable costs as a matter of right but could not receive an award of attorney's fees or other litigation expenses even if the judge believed such an award was in the interest of justice.

It was in this context that Congress adopted a 1934 amendment adding to § 11(e) the language relied upon by the district court in denying the defendants' motions for taxable costs. Congress' concerns were strike suits and sham defenses. As Judge Pollak observed after reviewing the legislative history, the amendment was "clearly directed to deterrence of frivolous suits; to quick resolution of suits to which there are no valid defenses; and to deterrence of bad faith, or meritless defenses to actions brought under the Securities Act of 1933." *LeMaster v. Bull*, 581 F. Supp. at 1173. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975) (stating that one reason Congress added cost-recovery provision to § 11(e) was to deter "strike" or nuisance actions); *Ernst*

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5. In addition to the "fund cases," the Court recognized "the historic power of equity" to award expenses beyond taxable costs in cases where there has been willful disobedience of a court order and in cases where the losing party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline*, 421 U.S. at 257, 258-59.

& *Ernst v. Hochfelder*, 425 U.S. 185, 211-12 n. 30 (1976) (noting that one of the purposes of amending § 11(e) to provide for cost recovery "was to deter actions brought solely for settlement value"). Congress spoke to these concerns by *conferring new authority* on the district courts -- the authority, in their discretion, to require cost bonds for, and make awards for, litigation expenses beyond taxable costs where those expenses are occasioned by a frivolous claim or defense. Nothing in the text of the amendment or its legislative history suggests that Congress also desired to deprive prevailing parties in § 11 actions of their absolute right to taxable costs under the Act of 1853 in cases where their opponents lost but had litigable claims. We see no reason why a provision obviously intended to allow greater-than-usual cost recovery under special circumstances should be interpreted to preclude the usual cost recovery when those special circumstances do not exist.[6]

III.

Because § 11(e) provides no alternative standard for awarding taxable costs and because defendants seek an award of taxable costs only, the district court's disposition of their motion cannot stand. Accordingly, we will reverse that disposition and remand so that the district court may exercise the discretion conferred by Rule 54(d). Such taxable costs as the court finds to be established by the record will be awarded to the defendants "as of course" unless the district court concludes that such an award would be inequitable.

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6. This case, as it comes before us, does not present the issue of whether and what litigation expenses beyond taxable costs and attorney's fees are recoverable under § 11(e) and we express no opinion with respect to that issue. The explicit inclusion in § 11(e) of authority to award attorney's fees is alone sufficient to dictate the above analysis reconciling that section with Rule 54(d).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit (8/26/88)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3014 and 88-3015

MILTON FRIEDMAN

vs.

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated, and ARTHUR YOUNG & CO., partnership

Laidlaw Adams & Peck, Inc. and
The Ohio Company,
Appellants in No. 88-3014

Arthur Young & Company,
Appellants in No. 88-3015

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER, *Circuit Judges*.

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WALTER K. STAPLETON
Circuit Judge

Dated: AUG 26 1988

APPENDIX D

Order of the United States Court of Appeals for the Third Circuit (10/11/88)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3014/5

MILTON FRIEDMAN

vs.

FLOYD R. GANASSI, etc.
LAIDLAW ADAMS, etc.,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until November 24, 1988.

WALTER K. STAPLETON
Circuit Judge

Dated: OCT 11 1988

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-859

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MILTON FRIEDMAN,

Petitioner,

- vs. -

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated and ARTHUR YOUNG & CO., a partnership,

Respondents.

BRIEF OF ARTHUR YOUNG & COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 88-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MILTON FRIEDMAN,

Petitioner,

- vs. -

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated and ARTHUR YOUNG & CO., a partnership,

Respondents.

BRIEF OF ARTHUR YOUNG & COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Because suits under section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, are seldom litigated to verdict, the courts are rarely called upon to award costs in such a case. For this reason, there is little law -- and little interest -- as to how courts reconcile section 11(e), which provides for the award "of the costs of such suit, including reasonable attorney's fees" where "the suit or the defense [was] without merit," with the taxable costs

provisions of rule 54(d) of the Federal Rules of Civil Procedure.

This class claim under section 11 was litigated to verdict, with the jury deliberating less than two hours -- after five week of trial -- before finding respondents not liable. Recognizing, as the trial judge later found, that petitioner's claim was "not entirely without merit," *Friedman v. Ganassi*, 674 F. Supp. 1165, 1166 (W.D. Pa. 1987) (the "District Court Opinion") (reprinted in Appendix A to the Petition for a Writ of Certiorari (the "Petition")), respondents did not seek attorneys' fees under section 11(e), but rather pursued only the taxable costs that go "as of course to the prevailing party" under rule 54(d). Believing that section 11(e) precluded an award of taxable costs under rule 54(d), the trial court denied respondents' bills of costs.

The Third Circuit reversed in an opinion which shed considerable light on this narrow and arcane issue. *Friedman v. Ganassi*, 853 F.2d 207 (3d Cir. 1988) (the "Third Circuit Opinion") (reprinted in Appendix B to the Petition). In a thoughtful and well-reasoned reconciliation of section 11(e) and rule 54(d), that court traced the evolution of cost awards, analyzed the legislative history of section 11(e), looked to analogous statutes and discussed the policy considerations underlying both the statute and the rule. It concluded that rule 54(d) governs the award of taxable costs where, as here, they are sought by a prevailing party, while section 11(e) governs the awarding of attorney's fees where a claim or defense is without merit.

In seeking certiorari in this Court, petitioner has offered no compelling reason for review of such a narrow and seldom-considered issue, particularly when the Third Circuit has rendered such a careful and compelling opinion.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN SECTION 11(e) OF THE SECURITIES ACT OF 1933 AND RULE 54(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH REQUIRES RESOLUTION BY THIS COURT

The Petition argues that rule 54(d) of the Federal Rules of Civil Procedure is subordinate to section 11(e) of the Securities Act of 1933, 15 U.S.C. 77k(e) (the "Securities Act"), *see* Petition at 8-10, and that the Third Circuit Opinion renders section 11(e) "meaningless." *See* Petition at 12-14. Numerous lower federal courts have explicitly, and this Court has implicitly, reconciled the taxable cost provisions of rule 54(d) with statutes which, like section 11(e), make reference to costs and have done so without rendering the statutes "meaningless." The only novelty here is that the Third Circuit Opinion is the first such reconciliation under the Securities Act. It is entirely consistent with prior decisions under the antitrust and civil rights statutes and presents no issue worthy of this Court's consideration.

The Third Circuit applied rule 54(d) to an award of the kind of taxable costs specified in 28 U.S.C. § 1920 and ruled that section 11(e) is applicable to attorneys' fees and other special costs. This analysis reflects the historical distinction between taxable costs -- "costs between party and party" -- and "costs as between solicitor and client," such as attorneys' fees and expert witness fees. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494 (1987); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939) (distinguishing attorneys' fees and certain other expenses from "ordinary taxable costs").

Petitioner's argument, in essence, is that, because section 11(e) refers to "costs," rule 54(d) can never be applicable in a section 11 case. Under that rationale, taxable costs under rule 54(d) could never be awarded in a case tried under a statute with a similar reference to "costs." There are scores of such statutes and the cases which have considered the issue have generally held, as did the court below, that taxable costs are awarded under rule 54(d) and special costs, such as attorneys' fees and expert witness fees, are awarded under the statute. *See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 896 (3d Cir. 1985) (civil rights); *Tillman v. Wheaton-Haven Recreation Ass'n*, 580 F.2d 1222, 1230 (4th Cir. 1978) (same); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964) (antitrust); *International Wood Processors v. Power Dry, Inc.*, 598 F. Supp. 299, 302 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986) (same); *Government of the Virgin Islands v. 19.623 Acres of Land*, 602 F.2d 1130 (3d Cir. 1979) (condemnation); *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 622 (3d Cir. 1975) (patent). Each of these decisions would be wrong under petitioner's theory.

Although this Court has never directly addressed this issue, either under the securities laws or other statutes, it is implicit in several of this Court's decisions that taxable costs are awarded under rule 54(d) and attorneys' or witness fees arise under the substantive statute at issue. For example, this Court could not have rendered its *Crawford Fitting* decision, with rule 54(d) as a centerpoint of its analysis, if that rule were inapplicable whenever, as in that antitrust case, a relevant statute authorized attorneys' fees and costs. *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) (civil rights); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (selective service).

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH REQUIRES RESOLUTION BY THIS COURT

Petitioner rests part of his argument for certiorari on a supposed conflict among the circuits. In fact, petitioner can cite only two cases decided almost 25 years apart, the decision below and *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371 (10th Cir. 1964).[1] That hardly bespeaks an issue crying out for resolution.

Further, the decisions are not necessarily in conflict. The case below involved only costs under rule 54(d), while *Beck* involved costs and attorney's fees only under section 11(e). It is not clear from the *Beck* decision that the Tenth Circuit would have reversed had the only award been for taxable costs and had that award been made under rule 54(d).[2] Finally, *Beck* contains no analysis at all of the issues raised by the Petition. This is in sharp contrast to the detailed analysis and resolution of the issues in this case by the Third Circuit.

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[1] Petitioner claims the decision below conflicts, not only with *Beck*, but also "with all other reported decisions under the Securities Act of 1933." Petition at 17. In fact, the "all" can only refer to one unreasoned 1980 district court decision, *McLish v. Harris Farms, Inc.*, 507 F. Supp. 1075 (E.D. Cal. 1980). The other decisions involving rule 54(d) and section 11(e) are collected in the Third Circuit Opinion, *see* Petitioner's Appendix B at 12a-13a, and they, at most, "imply the adoption of one position or another." *Id.* at 12a, quoting District Court Opinion, Petitioner's Appendix A at 3a.

[2] *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), involved rule 54(d) and section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e), which is similar to section 11(e) of the Securities Act. The lower court awarded attorneys' fees under, *inter alia*, section 9(e) and costs under rule 54(d). The Second Circuit reversed the attorneys' fees award but affirmed the cost award under rule 54(d). 620 F.2d at 350-51.

III.

THE DECISION BELOW IS NOT CONTRARY TO THE POSITION OF THE FEDERAL RULES ADVISORY COMMITTEE

Petitioner argues that, because the Advisory Committee for the Federal Rules of Civil Procedure listed section 11(e) as "unaffected" by rule 54(d), taxable costs cannot be awarded under rule 54(d). *See* Petition at 10-12. Contrary to petitioner's argument, that notation supports the result reached below.

At the time section 11(e) was adopted to provide for attorneys' fees as a deterrent to frivolous suits or defenses, *see* 78 CONG. REC. 8185 (May 7, 1934), *reprinted* in 1 FEDERAL BAR ASS'N, *Federal Securities Laws: Legislative History, 1933-1982* at 995 (1983), the practice of prevailing parties receiving their taxable costs had been in place for 700 years. *See* Goodhart, "Costs," 38 YALE L.J. 849, 853 (1929); 6 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE ¶ 54.70[2] (2d ed. 1987). Dean McCormick, the leading scholar of the day on damages and costs, noted shortly before the federal securities laws were adopted that taxable costs were a matter of right to the prevailing party in an action at law. McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 MINN. L. REV. 619, 620 (1931). That right was based, "not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes." *In re Peterson*, 253 U.S. 300, 316 (1920).

It is inconceivable that Congress, in adopting section 11(e), would have by indirection abandoned the ancient and accepted practice of awarding taxable costs to prevailing parties. Thus, if this case had been tried between the adoption of section 11(e) in 1934 and the adoption of rule 54(d) in 1938, taxable costs surely would have gone to respondents as the prevailing parties. The

continuation of that practice after adoption of rule 54(d) not only leaves section 11(e) unaffected, it also makes appropriate the awarding of taxable costs to the prevailing parties in this case.

CONCLUSION

The decision below creates no conflict between a statute and one of the Federal Rules of Civil Procedure; no conflict among circuits; and no conflict with the views of the Advisory Committee for the Federal Rules of Civil Procedure. It is a thoughtful -- and quite correct -- analysis of a very narrow, and seldom-litigated, legal issue. In short, it raises no issues worthy of this Court's consideration and the Petition for Certiorari should be denied.

New York, New York
December 22, 1988

Respectfully submitted,

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